

In the Matter of:)
)
Request for Review of the Decision of the)
Universal Service Administrator by)
)
BellSouth Telecommunications, Inc.)
Atlanta, Georgia)

Under the e-rate program, applicants may apply for discounted services after completing technology assessments and developing plans to ensure that services purchased will be used

effectively. Applicants then must submit FCC Form 470 to the Administrator, in which they describe their technological needs and the services for which they are requesting discounts. After complying with the FCC's competitive bidding requirements and entering into contracts with eligible service providers, schools and libraries then must file Form 471 applications notifying the Administrator of the ordered services, the service providers under contract for those services, and an estimate of the funds needed to cover the discounts to be given for eligible services. *Id.*

The Administrator reviews the Form 471s and makes funding commitment decisions indicating the discounts that applicants may receive pursuant to Commission Rules. Applicants then have a choice of either: (1) paying the bills in full and seeking reimbursement for funds from the Administrator via the service or equipment provider; or (2) paying the non-discount portion of the service cost to the service provider who, in turn, seeks reimbursement from the Administrator for the discounted amount. *Id.* ¶ 5. Discounts determined by the Administrator range between 20 and 90 percent (*i.e.*, applicants pay between 80 and 10 percent for eligible services and equipment), and are principally based on applicant need indicators. *Id.*

Applicants choosing the first payment/reimbursement option obtain the discounted amounts by submitting Form 472s to the Administrator. *See* Schools and Libraries Universal Service, Billed Entity Applicant Reimbursement ["BEAR"] Form, OMB 3060-0856, FCC Form 472. Exhibit A. Applicants self-certify on the BEARs that they are entitled to reimbursement of discounts on the approved services indicated, with respect to which they have already paid the service providers. *Id.* p. 3. On the last page of the BEARs, service providers must acknowledge their obligation to remit discount amounts received from the Administrator to the Applicants within specified time frames and prior to tendering the payments that have been issued to them. *Id.* p. 4. Service providers make no other certifications or acknowledgements on the BEARs.

B. The SLD's Commitment Adjustment Letter.

On April 24, 2003, the SLD notified BellSouth that funds disbursed for funding year 2001-2002 relating to the Union funding commitment were "committed in violation of program rules" and, therefore, "SLD is rescinding the committed amount in full" Letter from SLD to F. Reed, April 24, 2003 with attachments ("COMAD¹ Letter"). Exhibit B. The COMAD Letter specifically referred to Funding Request Number ("FRN") 594001 made by Union in the 2001-2002 Funding Year under its Form 471 (Application Number 229706). *Id.*

The SLD asserted that, after a thorough investigation, it had determined that the funding request by Union had been made in violation of program rules. The SLD explained:

After thorough investigation it has been determined that Tom Snell is associated with Send Technology LLC, a service provider. Tom Snell is also the contact person on the Form 470, 927550000315997 that is referenced for this funding request. The form 470 associated with this funding request contains service provider (SP) contact information, which violates the intent of the competitive bidding process. Competitive bidding violation occurs when a SP associated with

¹ "COMAD" stands for Commitment Adjustment.

the Form 470 participates in competitive bidding process as a bidder. As a result of the competitive bidding violations the SLD is rescinding the committed amount in full.

Based on Union's alleged improper conduct, SLD demanded payment from BellSouth in an amount equal to the funding SLD previously made to Union.

C. BellSouth's Appeal.

BellSouth appealed the SLD's COMAD Letter to USAC on June 24, 2003.² Letter from L. Foshee to SLD, USAC, June 24, 2003 with attachments. Exhibit C. USAC denied BellSouth's appeal in full by letter dated December 7, 2004. Letter from USAC to B. Slaughter, December 7, 2004. Exhibit D. This Request for Review timely appeals the USAC's December 7, 2004 decision.

QUESTION PRESENTED FOR REVIEW

The issue presented in this appeal is whether it is appropriate, under the facts of this case, for the SLD to seek recovery of the funds SLD disbursed to Union (through BellSouth) from Union -- the party fully responsible for the violations -- or BellSouth, which had no knowledge of the violations or the excess disbursements caused by the violations.

ARGUMENT

The Funds Should Be Recovered From The Party Committing The Violations -- Union -- Not BellSouth.

A. The SLD's recovery plan should not apply in this case.

The SLD cites violations (by Union) of the program "rules" as the basis for the demand upon BellSouth to reimburse funds previously provided by SLD to Union. Presumably, SLD relied upon the Commission's *Commitment Adjustment Order*³ as authority for its position that BellSouth should be the guarantor for Union's bad acts. The historical record makes clear, however, that when the FCC adopted the SLD's recovery plan in 1999-2000, it intended to cover situations in which funds were disbursed in violation of *statutory* requirements; e.g., when discounts were sought for ineligible services, or the services were provided by non-telecommunications carriers.

² BellSouth acknowledges that it mistakenly filed the appeal to USAC one day late and BellSouth is not challenging that finding in this proceeding. BellSouth is challenging the findings, analysis, and conclusions of the SLD's April 24, 2003 COMAD letter and, to the extent the USAC letter is also a finding on the merits, BellSouth challenges the USAC's December 7, 2004 letter.

³ *In re Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, FCC 99-291 ¶¶ 8, 9 (October 8, 1999) (hereinafter the "*Commitment Adjustment Order*")

Even so, the Commission has always made clear that it did not intend for the plan "to cover the rare cases in which the Commission has determined that a school or library has engaged in waste, fraud or abuse." Such situations, the Commission noted, should be addressed on a case-by-case basis. *Commitment Adjustment Order, supra*, at ¶¶ 7-10. See also *Third Report and Order and Second Further Notice of Proposed Rulemaking, supra*, at ¶¶ 78-80. It is this type of situation (apparent fraud by Union) that is the basis for the program violations cited by SLD.

More recently, in the *Third Report and Order and Second Further Notice of Proposed Rulemaking, supra*, the Commission further clarified its decisions in the *Commitment Adjustment Order* and *Commitment Adjustment Implementation Order*⁴ as follows:

While the Commitment Adjustment Implementation Order implemented procedures, consistent with the Commission's debt collection rules, for recovery of funds that were disbursed in violation of statutory requirements, the Commission has not comprehensively addressed the question of what recovery procedures would be appropriate in situations where it is determined that the funds have been disbursed in violation of particular programmatic rules that do not implicate statutory requirements. Likewise, the Commission has not addressed the question of what procedures are needed to govern the recovery of funds that have been committed or disbursed in situations later determined to involve waste, fraud or abuse.

Third Report and Order and Second Further Notice of Proposed Rulemaking, supra, at ¶ 79 (emphasis added). Accordingly, the Commission has sought public comment in support of its consideration of "whether [the Commission] should implement procedures or adopt rules for funds that are disbursed in violation of one or more programmatic rules or procedures under the schools and libraries program or in situations involving waste, fraud or abuse." *Id.* at ¶ 81.⁵

Thus, contrary to the SLD's approach in this matter, the Commission itself has made clear that one stock answer does not apply to every erroneous fund disbursement question, especially in the circumstances of apparent fraud. Rather, the FCC affirmed the SLD's recovery plan for a certain defined set of circumstances involving statutory violations, not the kind (or kinds) of violation (or violations) involved in this case. Whatever the source or cause of the "violations" made by Union, there is no indication of a statutory violation of the kind referred to in the Commission's rulings. Certainly, BellSouth has not engaged in any conduct itself that would justify compelling recovery from BellSouth as opposed to the party in error -- Union.

This case, thus, presents precisely the kind of situation to which the Commission has, at best, not addressed itself *vis a' vis* the SLD's recovery plan or, at worst, has so addressed itself and decided that "case-by-case" consideration was appropriate.

⁴ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 15 FCC Rcd 22975 (2000).

⁵ BellSouth filed Comments (March 11, 2004) and Reply Comments (April 12, 2004) in these proceedings.

B. Union, not BellSouth, prepared, self-certified and submitted the allegedly fraudulent requests and is solely responsible for any recovery.

The violations that caused the excess funds to be disbursed were committed entirely by Union. BellSouth had no conceivable role in the commission of those violations. The SLD's demand, thus, effectively treats BellSouth as a collections agent for a debt owed not by BellSouth, but by Union. This is not a role that BellSouth has sought to assume, and it is neither proper nor fair.

Indeed, in this instance the applicant school district (Union) appears to have engaged in fraud. This alleged fraud is detailed in two Investigative Audits of the E-Rate Program, conducted by the Office of the Legislative Auditor, State of Louisiana (the "Audit") in accordance with Title 24 of the Louisiana Revised Statutes.⁶ The Audits were completed on October 2, 2002 and January 15, 2003, and resulted in findings that indicate that the Union Parish School District (via Tom Snell), and SEND Technologies may have engaged in fraud or abuse with respect to the E-Rate Program.

Pursuant to SLD procedures, the Applicant bears sole responsibility to verify the accuracy of the numbers contained on the Form 472s. The service provider, on the other hand, is only obligated to certify that it will remit the discount amounts authorized to the Applicant as soon as possible and prior to tendering the payment issued to the service provider. In this case, Union, not BellSouth, had sole responsibility for ensuring that it was in compliance with the Form 470s. Union, for whatever reason or reasons, failed to meet its obligations here.

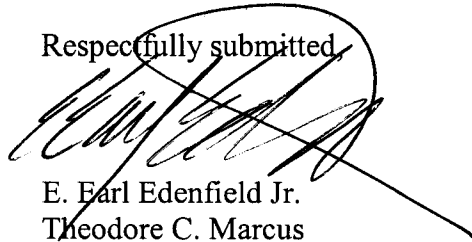
The SLD's practice of automatically seeking reimbursement from the service provider unacceptably relieves the Applicant of responsibility and incentive to comply with the Program rules, including complying with the Form 470s. If the party responsible for complying with the Program rules is not the party to be held responsible for violations (or this instance possible intentional fraud), then there is no incentive for the Applicant to do any due diligence to ensure compliance. The prospect that a school or library might be hauled into local court by a service provider seeking restitution of moneys had (and surely spent) is not a sufficient counterweight under the circumstances and, in any event, is a poor policy substitute for properly motivating the Applicants to ensure against fraud and abuse of the Program.

STATEMENT OF RELIEF SOUGHT

In consideration of the foregoing, BellSouth respectfully requests that the Commission reverse the decision of the SLD and rule that the SLD should not seek recovery of the disbursed funds from BellSouth or, alternatively, that the Commission remand the matter to the SLD with instructions that it conduct further proceedings consistent with its opinion.

⁶ These Audits are attachments to Exhibit C (the letter from L. Foshee to SLD dated June 24, 2003)

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Earl Edenfield Jr.', is written over the phrase 'Respectfully submitted,'.

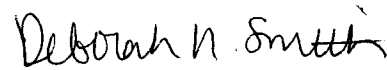
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CERTIFICATE OF SERVICE

I do hereby certify that I have this 4th day of February 2005 served a copy of the foregoing **REQUEST FOR REVIEW** via overnight mail to the following:

Universal Service Administrative Company
Schools & Libraries Division
Box 125 -- Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981



Deborah N. Smith